

- (1) Whether workers compensation proceedings involving injury occurring prior to

July 1, 1993, are subject to review by the Appeals Board.

(2) Whether Sections 19 and 58 of Senate Bill 307 are unconstitutional due to the selection process of the Appeals Board.

(3) What payments to claimant are included for computation of average weekly wage?

(4) What is the nature and extent of claimant's disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) The Appeals Board adopts the findings of fact and conclusions of law as set forth in the Award of Administrative Law Judge George R. Robertson, dated October 13, 1993, that are not inconsistent with those specifically made herein.

Senate Bill 307 (L.1993,ch286), Section 58(c) provides that review of any order entered under the Workers Compensation Act prior to October 1, 1993, shall be in accordance with the appellate procedure that existed under the Act prior to July 1, 1993. By inference, all reviews of orders under the Workers Compensation Act entered on or after October 1, 1993, shall be in accordance with Senate Bill 307.

Section 53 of Senate Bill 307, provides, in part:

"All acts, findings, awards, decisions, rulings or notifications of findings or awards made by an administrative law judge, shall be subject to review by the board upon written request by any interested party within ten days and if no such request is made, then the board shall approve such action, findings, awards, decisions, rulings or modifications of findings or awards of the administrative law judge."

The parties stipulated the date of accident in this proceeding to be December 2, 1990. Evidence was presented and the Administrative Law Judge entered his Award on October 13, 1993. As this proceedings is a review of an award entered after October 1, 1993, the Appeals Board has jurisdiction to hear and decide this review.

Claimant argues the Appeals Board is without authority to hear this review as the change in law effects his substantive rights. The Appeals Board finds this argument without merit as the newly enacted appellate procedure is strictly procedural in nature. Claimant's substantive rights have not changed; the only change being the procedural method by which they are finally determined.

(2) Senate Bill 307 was passed by the Kansas Legislature during the 1993 Session and signed into law by the Governor on May 11, 1993. Section 19 of the Bill established the Appeals Board and the manner of its selection. That selection process is now challenged by claimant as being unconstitutional as it allegedly violates the doctrine of separation of powers and the constitutional right of equal protection under the law.

The burden of proof is upon the party challenging the constitutionality of a statute. Constitutionality is presumed with all doubts resolved in favor of its validity before the statute may be stricken. Blue v. McBride, 252 Kan. 894, 850 P.2d 852 (1993).

The Appeals Board is conducting its duties pursuant to statute lawfully enacted by the Kansas Legislature and signed into law by the Governor. Until such time as a court of competent jurisdiction rules that the presumption of constitutionality has been overcome, the Appeals Board will continue to faithfully and judiciously carry out its responsibilities.

(3) From a review of the record and award, it appears the Administrative Law Judge included in the computation of average weekly wage payments to claimant for reimbursement of highway toll charges; charges to wire money and cash checks; wages paid to others for loading and unloading his truck; and a two-cents per mile expense reimbursement.

K.S.A. 1992 Supp. 44-511(a)(3) provides:

"The term 'wage' shall be construed to mean the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment."

Not every payment made to an employee by an employer constitutes "wages" for purposes of computation of average weekly wage. However, the computation does include those payments for work performed to the extent it results in economic gain to the employee. Ridgway v. Board of Ford County Comm'rs, 12 Kan. App. 2d 441, 748 P.2d 891 (1987), rev. denied 242 Kan. 903 (1988).

Based upon this analysis, payments to reimburse claimant for business related out-of-pocket expense for toll roads, check cashing charges, wire charges, and loading/unloading fees are not included in the average weekly wage computation. The reimbursement for these expenses is dollar for dollar and does not result in economic gain to claimant. The same analysis applies to the lodging expense reimbursement provided to claimant.

The payments identified in the records as cash advances are not included as separate items in the computation of average weekly wage as they are included in the gross pay figures provided. To include the cash advances as separate items would result in duplication.

The payment made to claimant based upon the two-cents per mile reimbursement rate is to be included as part of the average weekly wage as it does constitute economic gain to the claimant. As the records indicate, this money may be used by claimant in any manner he sees fit. As the claimant may apply this money for his meals, an expense that he would have had notwithstanding his employment activities, there exists economic gain.

Therefore, claimant's average weekly wage is \$496.21 which is comprised of \$427.52 per week for gross pay; \$48.20 per week for expense allowance at the rate of two-cents per mile; and \$20.49 per week for health insurance benefits.

(4) The next issue to be addressed is the nature and extent of claimant's disability. There is little question that claimant has experienced significant injury as a result of his work related accident on December 2, 1990. The cab portion of claimant's tractor-trailer rig was partially knocked off its frame due to the impact.

Claimant's treating physician, William A. Bailey, M.D., a board certified orthopedic surgeon, believes that claimant has experienced an eighteen percent (18%) permanent partial impairment of function as a result of this injury and should not lift over 20 pounds. Ideally, claimant should find employment that would allow him to sit for two hours, stand for three hours, and walk for three hours during the work day. Dr. Bailey believes that claimant is unable to return to his job as an over-the-road truck driver due to the cervical disc injury he received in this accident.

Respondent referred claimant to board certified orthopedic surgeon C. Reiff Brown, M.D. Dr. Brown saw claimant on July 27, 1993, and believes that claimant has herniated cervical intervertebral discs at C3-4 and C4-5 as a result of this accident. Dr. Brown's impairment rating is seven percent (7%), but does not take into account the loss of range of motion to the neck. Dr. Brown believes there is no way to determine claimant's cervical range of motion until he overcomes the physical deconditioning that has resulted. In addition, a loss of range of motion would be difficult to determine since Dr. Brown believes claimant has two, congenital, fused neck vertebrae at C5-6 and C6-7. Although Dr. Brown believes that claimant is incapable of working through a full day and should undergo a progressive exercise program and work hardening, the doctor believes that claimant will need to permanently avoid flexion and extension of the neck, repetitively moving the neck, and rough riding equipment.

The testimony of vocational expert Michael J. Dreiling is credible, persuasive, and uncontroverted. Mr. Dreiling is the Director of the Return to Work Center at Menninger and was hired by claimant's counsel to evaluate claimant's work injuries and their impact upon his ability to obtain employment and earn wages. Mr. Dreiling believes that claimant has experienced a seventy percent (70%) loss of access to the open labor market and a thirty to thirty-five percent (30-35%) loss of ability to earn comparable wages as a result of this accident. Mr. Dreiling bases his opinion of loss of ability to earn comparable wage upon the assumption that the claimant earned a pre-injury wage of \$427.00 per week and that claimant has a post-injury residual ability to earn wages in the range of \$6.00 to \$7.00 per hour. As the correct average weekly wage is \$496.21, as determined above, the Appeals Board finds the true loss of ability to earn a comparable wage is in the range of forty-eight to fifty-six percent (48-56%).

For injury occurring on or after July 1, 1987, the extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience, and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than the percentage of functional impairment. K.S.A. 1992 Supp. 44-510e. In Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991), the Kansas Court of Appeals held that this statute required the balancing of two factors: the ability to perform work in the open labor market and the ability to earn comparable wages. It is mandatory these factors be considered to compute the percentage of the injured worker's disability. Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

As indicated above, as a result of his accident of December, 1990, claimant has lost access to approximately seventy percent (70%) of the open labor market and has lost approximately forty-eight to fifty-six percent (48-56%) of his ability to earn a comparable wage. The Appeals Board finds it is proper in this instance to give equal weight to these losses and average them to determine work disability. The

mathematical average for which claimant should receive permanent partial disability benefits is sixty-one percent (61%).

AWARD

The Award of the Administrative Law Judge is modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY ENTERED in favor of the claimant, Michael Sedlak, and against the respondent, All Freight Systems, Inc., and its insurance carrier, Travelers Insurance Company. The claimant is entitled to 111 weeks of temporary total disability at the rate of \$278.00 per week or \$30,858.00 followed by 304 weeks at \$201.80 per week or \$61,347.20 for a sixty-one percent (61%) permanent partial general bodily disability making a total award of \$92,205.20. As of January 9, 1994, there would be due and owing to the claimant 111 weeks temporary total compensation at \$278.00 per week in the sum of \$30,858.00 plus 51 weeks permanent partial compensation at \$201.80 per week in the sum of \$10,291.80 for a total due and owing of \$41,149.80 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$51,055.40 shall be paid at \$201.80 per week for 253 weeks or until further order of the Director.

FURTHER AWARD IS MADE that claimant is entitled to medical expenses, and any unauthorized medical expense, if any, up to the statutory maximum of \$350.00.

Future medical will be considered upon proper application to the Director.

Claimant's contract for attorney fees is approved.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and such are directed to pay costs of the transcripts as follows:

OWENS, BRAKE & ASSOCIATES

Regular Hearing Transcript, Dated May 14, 1993	\$ 276.13
Deposition of Dr. C. Reiff Brown, Dated August 4, 1993	\$ 252.94
Total	<u>\$ 529.07</u>

BRAKSICK REPORTING SERVICE

Deposition of Dr. William Bailey, Dated May 24, 1993	\$ 171.90
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HOSTETLER & ASSOCIATES, INC.

Deposition of Michael Dreiling, Dated May 21, 1993	\$ 303.75
Deposition of Richard Campbell, Dated June 7, 1993	<u>\$ 125.85</u>

Total \$ 429.60

IT IS SO ORDERED.

Dated this ____ day of January, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Chris Miller, P.O. Box 1265, Lawrence, Kansas 66044
 C. Stanley Nelson, P.O. Box 1247, Salina, Kansas 67402-1247
 George R. Robertson, Administrative Law Judge
 George Gomez, Director